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Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 170

PREFERRED INSURANCE COMPANY, Grand Rapids, Michigan, a Michigan corporation (in Liquidation, RUSSELL E. VAN HOOSER, Insurance Commissioner of the State of Michigan and Domiciliary Receiver),

Petitioner,

versus

JAMES L. BENTLEY, Insurance Commissioner of Georgia, and STATE BOARD OF WORKMEN'S COMPENSATION,

Respondents.

RESPONSE OF WILLIE RUTH SIMMONS AND H. B. SIMMONS, CLAIMANTS, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1454

PREFERRED INSURANCE COMPANY, Grand Rapids, Michigan, a Michigan corporation (in Liquidation, RUSSELL E. VAN HOOSER, Insurance Commissioner of the State of Michigan and Domiciliary Receiver),

Petitioner,

versus

JAMES L. BENTLEY, Insurance Commissioner of Georgia, and STATE BOARD OF WORKMEN'S COMPENSATION,

Respondents.

RESPONSE OF WILLIE RUTH SIMMONS AND H. B. SIMMONS, CLAIMANTS, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA.

Now Come Willie Ruth Simmons and H. B. Simmons and respond to the petition for writ of certiorari in the above styled case.

OPINIONS BELOW.

The only opinion of the Court below to which application for certiorari is timely filed is the opinion of

February 20, 1969, cited as 166 S.E.2d 340. The prior opinion of October 20, 1967, (223 Ga. 735, 157 S.E.2d 737) is not before the Court for review.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1251 (1) (sic), dealing with "original jurisdiction."

This is a petition for certiorari. Neither original jurisdiction nor grounds therefor appear.

QUESTIONS PRESENTED.

Respondents contend that none of the questions allegedly presented are in fact properly presented nor are they before this Court on this petition.

Each of the questions were necessarily decided adversely to petitioner by the Supreme Court of Georgia in its judgment of October 20, 1967, reported at 223 Ga. 735, 157 S.E.2d 737. This fact more clearly appears from respondents' supplemental statement of the case.

No appeal or petition for certiorari was filed to the judgment of October 20, 1967, and the decision therein is now the law of the case.

None of the constitutional questions allegedly presented were raised in the trial court. See applicant's Objections to Final Order of Court (Petition for Certiorari, Appendix L, p. 28a).* The questions were not raised in the Supreme Court of Georgia. See petitioner's Enumeration of Errors, filed in the Supreme Court of Georgia (Appendix Q, p. 40a).

*Appendices hereafter referred to are also to the Petition for Writ of Certiorari.

Appellate procedure in Georgia requires that all issues on which the appellant relies be set forth in an Enumeration of Errors. Georgia Code Section 6-810 (Ga. Laws, 1965, pp. 240, 243), *Close v. Walker Land Corporation*, 1965, 221 Ga. 329, 145 S.E.2d 245.

Consequently, the alleged constitutional issues presented in this application were not presented to the Supreme Court of Georgia, were not passed on by that Court and will not be considered by this Court. *Pickering v. Board of Education*, 1968, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731; *Hulbert v. Chicago*, 1906, 202 U.S. 275, 50 L.Ed. 1026, 26 S.Ct. 617.

RESPONDENTS' SUPPLEMENTAL STATEMENT OF THE CASE.

This case was initially before the trial court on the petition of the ancillary receiver for instructions as to the disposition of certain deposits held by him in the amount of Eighty Thousand ($80,000.00) Dollars (Appendix E, p. 11a). The trial court decreed "that the entire $80,000.00, held as deposit, be payable to proper Georgia policy claimants, and that the remaining balance, if any, be payable to the Michigan domiciliary receiver;" (Appendix G, p. 16a).

The Supreme Court of Georgia affirmed the judgment "that the deposits made with this state by a Michigan insurance company, now in receivership, be held for the benefit of all Georgia claimants" on the ground that "there was no evidence that Michigan is a reciprocal state and therefore entitled to the benefit of (the Georgia Uniform Insurers Liquidation Act)." (Appendix B, p. 6a; 223 Ga. 735, 157 S.E.2d 737.)

Under Georgia law, the claimant appellees were not bound by the allegations of the receivership petition, which

they were not called upon to answer. *Fincher v. Stanley Electric Mfg. Co.*, 1906, 127 Ga. 362, 56 S.E. 440; *Bank of Garfield v. Clark, et al.*, 138 Ga. 798(6), 76 S.E. 95; Georgia Code Section 38-403(2).

Following the receipt of the remittitur from the Supreme Court of Georgia, the trial court on January 17, 1968 passed the following order:

> "It is hereby ordered that the time and place for the presentation, proof, and allowance of claims against the deposits made by Preferred Insurance Company in the State of Georgia that are in the amount of Eighty Thousand ($80,000.00) Dollars, and against any other assets of that company that are in this State, shall be on the fifth day of April, 1968, . . ."

On February 9, 1968, the trial court passed its further order, to-wit:

> "IT IS ORDERED that the Ancillary Receiver file his report with the Court setting forth all claims filed with him, the amount thereof, and his recommendations as to the allowance and amount of each claim to be allowed, such report to be filed on or before the 25th day of March, 1968."
>
> "IT IS FURTHER ORDERED that a copy of such report be served on all claimants and all other interested parties, or upon their attorneys, within five days of the filing thereof, and that all parties file such objections as they may have to the allowance of any claims or the amount thereof within fifteen days after service upon him.
>
> "Upon the filing of the foregoing report and the opportunity to all parties to file objections, the case is set for hearing before the undersigned Judge on the 15th day of April, 1968, at 10:00 A.M. on the matter of the Receiver's report, objections thereto and the pro-

cedure to be followed in the proper disposition of controverted issues." (R-270.)

Petitioner has failed to designate these portions of the record in the Supreme Court of Georgia to be sent to this Court but the fact and substance thereof is adequately stated in the opinion of the Court below. (Appendix A, pp. 1a, 2a.)

Petitioner made no attempt to comply with the orders of the court and made his objections for the first time six months after the hearing on objections and the order of the trial court thereon. Petitioner waived his objections not timely filed. (Appendix A, p. 4a.)

The Court below dealing with petitioner's enumerations of error raising issues predicated upon the Uniform Insurers Liquidation Act held in the judgment now sought to be reviewed (February 20, 1969) that the ruling of the initial appeal (October 20, 1967) "established the law of the case adversely to the contentions of the appellant domiciliary receiver on these issues." (Appendix A, p. 3a.)

The construction and effect of a prior decree of the state court on subsequent litigation is a matter of state procedure and not reviewable in this Court. *King v. West Virginia*, 1910, 216 U.S. 92, 54 L.Ed. 396, 30 S.Ct. 225.

Reference is made in petitioner's statement to the failure of the trial court to receive in evidence a copy of the Michigan statute on the Uniform Insurers Liquidation Act. Noteworthy is the fact that, although litigation over the deposits in Georgia had been in progress for over two years, the Michigan statute was offered in evidence for the first time on October 4, 1968, approximately six months after the trial court had passed on all objections to the receiver's report. (Appendix R, pp. 45a, 46a.) The judgment of the trial court

that the Michigan statute was not relevant to any matter before the court on October 4, 1968, was upheld by the Supreme Court of Georgia in holding that "The court's approval of this (final) report (on October 4, 1968) did not determine any issue that had not already been considered and adjudicated by it upon the hearing on objections to the report and recommendations filed by the ancillary receiver approximately six months previously." (Appendix A, p. 4a.)

REASONS TO DENY THE WRIT.

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin specially set up in the state court, and denied by the rulings and judgment of that court." *Waters-Pierce Oil Co. v. Texas*, Tex., 1909, 29 S.Ct. 220, 212 U.S. 86, 53 L.Ed. 417.

No substantial federal issue is presented by the judgment sought to be reviewed. 28 U.S.C. Sec. 1257 (3).

The judgment was predicated on two procedural grounds, to-wit:

(1) Petitioner's enumeration of errors were controlled adversely to petitioner by a prior decision, and

(2) Petitioner's objections in the trial court were not timely filed.

Matters of the construction of state statutes are exclusively for the state courts, where no federal right is infringed. *Garner v. State of La.*, 1961, 368 U.S. 157, 7 L.Ed.

2d 207, 82 S.Ct. 248; *Musser v. State of Utah*, 1948, 333 U.S. 95, 92 L.Ed. 562, 68 S.Ct. 397.

Particularly are matters of procedure the province of the state court where no federal right is denied. *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies*, 1941, 312 U.S. 287, 85 L.Ed. 836, 61 S.Ct. 552, 132 A.L.R. 1200; *Greenough v. Tax Assessors of City of Newport*, 1947, 331 U.S. 486, 91 L.Ed. 1621, 67 S.Ct. 1400, 172 A.L.R. 329.

If the petitioner was not barred by the law of the case and his failure to file timely objections, his assignment of errors presents no federal question. The right of a state to administer the assets located within its bounds has been clearly recognized by this Court. *Fischer v. American United Life Insurance Company*, 1941, 314 U.S. 549, 86 L.Ed. 444, wherein it is said:

> ". . . The res is located in the (ancillary) state and is in the hands of the receiver there, and, under the law of that state, the claims of the other receivers thereto are inferior to those of local creditors."

See also Annotations, 104 A.L.R. 748-751; *State ex rel van Shaick v. Bowen*, 131 Ohio St. 310, 2 N.E.2d 824; *Lloyds Insurance Company of America v. State*, Texas, 1936, 98 S.W.2d 259; *Re Southern Surety Co. of New York*, 282 N.Y. 54, 24 N.E.2d 845, 127 A.L.R. 497; *Clark v. Preferred Accident Insurance Company of New York*, S.C. 1957, 97 S.E.2d 498; *Couch on Insurance*, 2d Ed., 1959, Sec. 22:90, 91; 53 Corpus Juris 407.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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